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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SHEARN MOODY, JR.,
Petitioner,

v.

STATE OF ALABAMA ex rel.
THARPE FORRESSTER, COMMISSIONER OF
INSURANCE OF THE STATE OF ALABAMA

and

PROTECTIVE LIFE INSURANCE CO.,
Respondents.

PETITIONER'S REPLY BRIEF

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1.

Adjectives aside,[1] respondents' opposition relies wholly on a misconception of the issue this petition presents.[2] Respondents

[1] *See* Joint Brief in Opposition to Petition for Writ of Certiorari (Jt. Opp.) at 8 ("glib and formalistic"), 9 ("desperate and distorted"), 13 ("strained").

[2] All the questions presented here were preserved below in both the Jefferson County Circuit Court and the Alabama Supreme Court: the

(continued)

harp on the *quasi in rem* nature of the Alabama insurance receivership proceeding as disposing of this case, ignoring that this is only half of what is necessary before a state court may enjoin federal litigation. The other half of the permissible basis for such injunction is that the lawsuit *to be enjoined* also must be *in rem* or *quasi in rem;* and if the proposed federal action is not *in rem* but is *in personam,* then the state may not enjoin its filing and prosecution, *see* Petition for Certiorari (Pet.) 9-12.[3] As respondents seem to concede (Jt. Opp. 12),the proposed federal action here is undeniably *in personam.*[4]

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Donovan issue, Pet. 9-12 (Reason for granting the Writ 1), Motion for Order Permitting Shearn Moody, Jr. to Institute Litigation (Circuit Court) at 1-2, Petition for Writ of Mandamus (Alabama Supreme Court) at 6; the conflict that denial to petitioner of his right to institute an *in personam* action would present with lower federal court decisions, Pet. 12-15 (Reason 2), Motion at 4, Petition for Mandamus at 7; such a decision's interference with federal courts' jurisdiction, Pet. 16-17 (Reason 4), Motion at 6, Petition for Mandamus at 14-15; and such a decision's abridgement of petitioner's right to petition the federal courts for redress of grievances, Pet. 18-19 (Reason 5), Motion at 8, Petition for Mandamus at 17. The national importance of this case because of the proliferation of anti-litigation statutes in other states, Pet. 15-16 (Reason 3), which is especially pertinent to this Court's exercise of certiorari jurisdiction, was not discussed below, as beyond the competence of the Alabama courts to consider.

[3]Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456 (1939), makes this clear. In the paragraph respondents themselves quote (Jt. Opp. 11), Princess Lida held:

> Where the judgment *sought* is strictly in personam, both the state and federal court may proceed with the litigation . . . On the other hand, if the *two* suits are in rem, or quasi in rem, . . . the jurisdiction of one court must yield to that of the other.

Id. at 466 (emphasis added).

[4]Respondents simply misread the proposed complaint in saying that petitioner seeks to recover for damage "to" Empire (Jt. Opp. 12 n. 11).

(continued)

2.

To say, as respondents do, that *General Atomic Co. v. Felter*, 434 U.S. 12 (1977), interpreted the *Donovan (v. City of Dallas*, 377 U.S. 408 (1964)) rule as prohibiting state court injunctions against only "strictly *in personam* litigation" (Jt. Opp. 9 n. 9), does not help to make Alabama's actions proper. Petitioner's proposed litigation, which Alabama enjoined, is "strictly *in personam.*" *Donovan* and *General Atomic* squarely apply, and require reversal of the lower courts' decisions enjoining prosecution of that litigation. In these circumstances "the *quasi in rem* exception to the general rule discussed in *Donovan*" did not permit Alabama to "restrain petitioner from instituting the proposed litigation" (Jt. Opp. 10).[3]

3.

Apparently aware of their fallacy, respondents try to bring this case within the *Donovan* rule. They assert (Jt. Opp. 12) that

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Petitioner seeks to recover for his loss of the value of his stock interest ownership *in* Empire, for tortious deprivation of constitutional rights, for violation of federal statutes and for tortious conspiracy. Pet. App. C 10-12; *see*, in particular, ¶ 54 "Damages", *id.* 12: "[a]s a result of defendants' actions Moody was deprived of the value of his majority interest in Empire . . . ." Even if petitioner's proposed action were a derivative suit, that would not change the nature of the relief it seeks, namely money damages.

[3]Respondent appears to suggest that the lower courts correctly denied petitioner the right to file his federal action because it was like another action dismissed by a federal court in 1975 (Jt. Opp. at 5 n. 5), or like other complaints whose filing Alabama had denied or had punished (*Id.* 6, 7). This sounds like a *res judicata* argument — which might be appealing if this Court had not squarely rejected just that argument in *Donovan* and *General Atomic*. *See* Pet. 9-10 n. 11, quoting *General Atomic*, 434 U.S. at 17. And *see* the brief of the American Civil Liberties Union as *amicus curiae*, at 5-9.

a decision in petitioner's proposed *in personam* action, determining that fraud and conspiracy indeed had infected the receivership, would somehow affect the receivership court's jurisdiction and could therefore be enjoined. Yet such a decision in a purely *in personam* action for money damages would do no more than require the liable defendants to pay petitioner money, as damages. The receivership court's disposition of the *res*, the corporation (Empire Life) and its assets (insurance policies and property) could not be affected, and its jurisdiction would remain unimpaired.

4.

Respondents conclude by arguing (Jt. Opp. 14) that the decisions below are consistent with Article III (*see* Pet. 16-17) and the First Amendment (*see* Pet. 18-19). It is of course correct that a state court may enjoin a federal *in rem* action that would disturb a state court's *in rem* jurisdiction over the same *res*, and that in such a case this Court would not hold that the state's injunction unconstitutionally interferes with federal court jurisdiction or a litigant's right to petition the federal courts for redress of grievances.[6] The point is that this Court's decisions in *Donovan, Princess Lida* and *General Atomic* set the limits beyond which the states must not go; limits that Alabama plainly has overstepped here.[7] For respondents to urge that these decisions make Alabama's action here constitutionally permissible is like suggesting that because a state may punish one who "falsely shouts fire in a theater," *Schenck v. United States*, 249 U.S. 47, 52 (1919), a state may also ignore the First Amendment

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[6]*See* the Brief of the Texas Institute of Government as *amicus curiae*, at 11-16.

[7]The Alabama Supreme Court's failure was not in declining to hear oral argument here (*see* Jt. Opp. at 7-8 n. 8), but in its decision, in which it gave no consideration to *Donovan* and its progeny or to the constitutional issues involved, and declared a new rule altogether at variance with *Donovan*. Pet. 8.

and punish other kinds of speech it considers offensive, like peaceful picketing, *Thornhill v. Alabama*, 310 U.S. 88 (1940), or comments on judicial proceedings, *Bridges v. California*, 314 U.S. 252 (1941).

Respectfully submitted,

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